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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 866

MERRITT-CHAPMAN & SCOTT CORPORATION, *Petitioner*

v.

W. WALLACE KENT, *Respondent*
United States District Judge for the Western
District of Michigan

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Index to Authorities Cited.	
Petition for Writ of Certiorari	1
(a) Judgment to be Reviewed	1
(b) Statutory Provisions Conferring Jurisdiction	2
(c) Questions Presented for Review	3
(d) Statutes Involved	3
(e) Statement of Facts	4
(g) Basis of Federal Jurisdiction	22
(h) Reasons Supporting Review by This Court on Certiorari	22
(i) Argument in Support of Reasons Relied on for the Allowance of the Writ	22
Conclusion	37

APPENDICES

Appendix A—Copy of Opinion of Sixth Circuit Court of Appeals	1a
Appendix B—Motion to Require Amendment of Complaint or in Alternative to Strike	2a
Appendix C—Telegram Dated September 18, 1962 and Letter Dated September 17, 1962	6a
Appendix D—Transcript of Proceedings before Judge Kent on September 21, 1962	8a
Appendix E—Motion for Continuance	26a
Appendix F—Opinion in Albert v. United States, 283 F. 2d 61 (CA 6, 1960) cert. denied 265 U.S. 828 (1961)	30a
Appendix G—Order Denying Stay of Proceedings Pending Review by Supreme Court	34a
Appendix H—Press Release Dated September 18, 1962	35a

INDEX TO AUTHORITIES CITED

Page

Samuel G. Albert v. United States District Court for the Western District of Michigan, Northern Division, 283 F. 2d 61 (CA 6, 1960) Cert. denied 365 U.S. 828 (1961) 20, 21, 29, 30
Barsky v. Holtzoo, No. 126 Misc. April Term, 1947 31
Beacon Theatres, Inc. v. Westover, 1959, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. F. 2d 988 34
Berger v. United States, 255 U.S. 22, 30 ..... 2, 23, 27, 29, 37
Black v. Boyd, 248 F. 2d 156 33
Collier v. Picard, 237 F. 2d (CA 1956) 20
Cuddy v. Otis, 1929, 33 F. 2d 577 31
Egan v. The City of Aurora et al, 365 U.S. 514 20
Ex parte American Steel Barrel Company and Seaman, 230 U.S. 35 24
Ex parte Simons, 1918, 247 U.S. 231, 38 S. Ct. 497, 62 L. Ed. 1094 34
Ex parte United States, 287 U.S. 241 32
Foster v. Medina, 1948, 170 F. 2d 632, certiorari denied 1949, 335 U.S. 909, 69 S. Ct. 412, 93 31
Gladstein v. McLaughlin, 1955, 230 F. 2d 762 32
Glasgow v. Moyer, 225 U.S. 420 24
Green v. Murphy, 259 F. 2d (CA 1958) 21, 28, 29, 30, 31, 32, 33, 34, 35
Henry v. Speer, 201 Fed. 869 ..... 24, 25, 27, 31
Hurd v. Letts, 152 F. 2d 121 (CADC 1945) 21, 30
In re Green, 160 F. 2d 517, 519 32
In re Josephson, 218 F. 2d 174, 177 34
In re Lisman, 1937, 89 F. 2d 898 ..... 31, 33
In re Union Leader Corporation, CCAL, 292 F. 2d 381 (1961) 33, 34
In re United Shoe Machinery Corporation, CCA 1, 276 F. 2d 77 (1960) 33
Korer v. Hoffman, 212 F. 2d 211 (CA 7, 1954) 21, 30
La Buy v. Howes Leather Company, 352 U.S. 249 ..... 22, 34
Minnesota & Ontario Paper Co. v. Molyneaux, 1934, 70 F. 2d 545 ..... 31, 32, 33
United States District Court v. Bradt, Sept. 21, 1961, 294 F. 2d 879 13
United States v. Ritter, 10 Cir., 1959, 273 F. 2d 30, 32, certiorari denied, 362 U.S. 946, 950, 80 S. Ct. 863, 4 L. Ed. 2d 869 35
Williams v. Kent, 1954, 216 F. 2d 342 ..... 20, 31, 32, 33
Moores Federal Practice, Paragraph 54, P. 68 35

STATUTES: Page

28 USCA Sect. 144 ..... 3, 7, 22, 23, 29, 37
28 USCA Sect. 1254 2
28 USCA Sect. 1332 22
28 USCA Sect. 1651 (a) 2, 3, 4, 22, 23, 30, 32, 33, 35, 37
Rule 36, Federal Rules of Civil Procedure 5, 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Merritt-Chapman & Scott, your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on November 26, 1962.

(a) JUDGMENT SOUGHT TO BE REVIEWED

The judgment herein sought to be reviewed was dated and filed for entry by the Clerk of the Sixth Circuit Court of Appeals on November 26, 1962, in Action No. 15196, and is unreported as yet. (Copy of opinion attached hereto as Appendix A.)

(b) STATUTORY PROVISIONS CONFERRING JURISDICTION

The following statutory provisions confer jurisdiction upon this Court to review said judgment by writ of certiorari:

1. 28 United States Code Annotated, paragraph 1254,

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;—

2. 28 United States Code Annotated, paragraph 1651,

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(c) QUESTIONS PRESENTED FOR REVIEW

1. Under Section 144, 28 United States Code Annotated, what is the duty and power of the trial judge against whom an affidavit of bias and prejudice is filed: Does a filing of an affidavit of personal bias and prejudice compel his retirement from the case or can he exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them? (see similar question, *Berger* v. *United States*, 255 U.S. 22, 30)

2. Where an affidavit of bias and prejudice and a motion are filed with a trial judge pursuant to 28 U.S.C.A., paragraph 144, and denied by the trial judge who patently went behind the facts alleged in the

affidavit, and thereafter an original action in the nature of a petition for a writ of prohibition is filed with the appellate court, alleging the filing of the affidavit of bias and prejudice and the facts therein contained, the denial by the trial judge and other facts and circumstances prior to and subsequent to its denial, showing that the trial judge is disqualified to continue as presiding judge, does the All Writs Statute 28 U.S.C.A. 1651 (a) give to the appellate court the power to consider that petition so that the appellate court is called upon to exercise its discretion, under all of the facts and circumstances set forth, as to whether or not the petition should be granted?

(d) STATUTES INVOLVED

The statutory provisions which this case involves are:

1. Section 144, 28 United States Code Annotated:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, C. 139, Sec. 65, 63 Stat. 99."

2. Section 1651 (a) 28 United States Code Annotated:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(c) STATEMENT OF FACTS

1. On September 6, 1960, the Mackinac Bridge Authority, a Michigan corporation, filed its complaint in the United States District Court for the Western District of Michigan, Northern Division, Civil Action 761, against Merritt-Chapman & Scott Corporation, a Delaware corporation, and Prepakt Concrete Company, an Ohio corporation, as defendants, claiming damages of $750,000.

2. On November 14, 1960, petitioner filed its answer to said complaint, but it expressly alleged that it had had insufficient time to sort out and deliver to its counsel its voluminous files pertaining to the case, that it was filing an answer because of the refusal of plaintiff's counsel to grant an extension of time, and that it was certain that petitioner would desire at a later date to file an amended answer and that other pleadings would be addressed to the complaint.

3. On January 27, 1961, petitioner filed a motion to dismiss counts 2 to 7 inclusive of plaintiff's complaint (see Appendix B), or in the alternative to require the amendment thereof, but respondent never entered an order on this motion and it was not until more than 14 months later that plaintiff amended its complaint on April 12, 1962. The amended complaint is still subject to objections and a motion as to petitioner's further objections is ready for filing except for the fact that

petitioner is fearful of placing itself in the hands of respondent to any degree whatsoever.

4. As a part of its discovery proceedings under Rule 36, Federal Rules of Civil Procedure, petitioner, prior to June 19, 1962, prepared 327 requests for admission by plaintiff, Mackinac Bridge Authority, and in the interest of time, offered to permit plaintiff's counsel to examine, in petitioner's office, the documentary basis for all of said requests, and there are further requests which petitioner wishes to make depending entirely upon the outcome of the ruling of a court upon petitioner's objections to the present responses. This is only one of many petitions, motions, or other discovery proceedings which petitioner is fearful of bringing in respondent's jurisdiction.

5. Plaintiff's counsel did, pursuant to said offer, prior to June 19, 1962, examine said documentary basis. On June 19, 1962, when said 327 requests for admission were served, the parties stipulated the plaintiff should have forty days in which to answer said requests. Plaintiff did not answer the first 327 requests within the stipulated time.

On August 1, 1962, petitioner served an additional 45 requests for admission upon the plaintiff, and plaintiff did not comply with the 10-day limitation of Rule 36 by several days as to the last 45 requests, although plaintiff was also aware of the basis for the latter requests.

6. On August 10, 1962, counsel for petitioner and plaintiff met in chambers with respondent, and, without prior notice and over objection by petitioner, respondent informally granted to the plaintiff an additional ten days for response by plaintiff and no order

to petitioner's knowledge was ever entered by respondent.

7. That later on September 21, 1962, in referring to the chamber conference of August 10, 1962, respondent failed to refer to the fact that petitioner's counsel had on August 10, 1962, advised respondent that he intended to be in New York the following week for certain visual medical services and for consultation with petitioner, but respondent, on the next working day, August 13, 1962, entered an order requiring the reappearance of petitioner's counsel in Grand Rapids despite assurances which respondent had given to counsel, and respondent never specifically denied the allegations contained in the petition for mandamus filed with the Sixth Circuit Court of Appeals on September 26, 1962, in which petitioner alleged that there was antagonism and partiality on the part of respondent and that there was a deterioration of normal and ordinary relationships between respondent and petitioner.

8. Upon the failure of plaintiff to respond within the extended time, on August 21, 1962, petitioner filed with respondent a motion that he enter an order that plaintiff, by its failure to respond, be deemed to have admitted petitioner's requests. Upon the failure of respondent to set said motion for hearing prior to September 7, 1962, petitioner on that date filed a second motion asking for immediate action on the August 21 motion, and finally, respondent noticed said motion for hearing on September 18, 1962, remaining adamant that the case should be tried on October 1, 1962, which was the date that he had previously set for trial, in spite of the fact that on many occasions petitioner had brought to the attention of respondent that it had many months of pre-trial work before trial. These state-

ments were always met with the retort that all of petitioner's motions would be heard one hour before trial on the date set, and respondent repeated that the business of the court would not allow the respondent to hear any motions prior to trial.

9. On September 17, 1962, New York counsel for petitioner wired Mr. Joseph F. Deeb, who is in active charge of said case in the United States District Court as follows:

"JOSEPH F. DEEB, MESSRS. DEEB DUNN & ELFERDINK
SUITE 600 MICHIGAN TRUST BLDG GRAND RAPIDS MICH.
I HAVE ADVISED MERRITT CHAPMAN & SCOTT CORPORATION AS TO THE FACTS WHICH YOU HAVE JUST COMMUNICATED TO ME. SOME OF THOSE FACTS WITH RESPECT TO COURT PROCEDURE I KNEW BEFORE OTHER FACTS DEALING WITH THE TRIAL JUDGE'S RELATIONS OUTSIDE OF COURT WITH PLAINTIFF'S COUNSEL WE HAD NOT KNOWN BEFORE. BECAUSE THESE ADDITIONAL FACTS ARE OF SUCH A SERIOUS NATURE VIEWED IN THE LIGHT OF THE REMAINING FACTS REFERRED TO WE REQUEST THAT YOU IMMEDIATELY CONTACT THE COURT AND REQUEST THAT THE COURT HOLD IN ABEYANCE ANY AFFIRMATIVE ACTION IN BEHALF OF THIS DEFENDANT PENDING DETERMINATION AS TO WHAT COURSE IT WILL TAKE WITH RESPECT TO THE TRIAL JUDGE. THAT MATTER SHOULD BE DETERMINED TODAY.

JAMES J. A. GALLAGHER"

10. Thereupon, on September 18, 1962, prior to the time set for hearing on said motion, Mr. Deeb prepared and hand-delivered to respondent's secretary a letter, pursuant to the request in the telegram, with a copy thereof attached, and referring to the possibility of the filing of an affidavit of bias and prejudice under Section 144, 28 U.S.C.A. and stating that if the affidavit were filed, and until the matter was disposed of, the present status of the case should be maintained and petitioner should not ask affirmative action by the court upon defendant's motion. (Copy of letter and telegram in Appendix C.) When this letter was hand-

delivered, respondent refused to discuss the matter and passed petitioner's counsel without speaking where he was sitting in respondent's waiting room.

11. Upon that same date, September 18, 1962, respondent, upon being informed that an affidavit of bias and prejudice would be filed, set the affidavit for hearing on September 21, 1962, and also set for that same time a hearing upon the pending motion that the plaintiff be deemed, by reason of its failure to answer, to have admitted said requests for admission by petitioner, and on that same date the Grand Rapids daily newspaper carried an account of the fact that respondent was among those designated to receive the highest honor in Freemasonry in Philadelphia the following week in sessions to be presided over by George E. Bushnell, Sr., an attorney who was a part of the law firm opposing petitioner. (Copy of press release attached as Appendix H.)

12. On September 19, 1962, the affidavit of Mr. Myles C. Mc Gough, Executive Vice President of petitioner, certification of counsel, and motion of petitioner were filed with the court.

13. The affidavit of bias and prejudice dated September 17, 1962, stated:

> "Affidavit of Prejudice—Civil Action No. 761
>
> Myles C. Mc Gough, being duly sworn, deposes and says:
>
> "1. I am the Executive Vice-President of Merritt-Chapman & Scott Corporation, defendant herein, and I make this affidavit on its behalf.
>
> "2. I believe that the Honorable W. Wallace Kent, Judge of the United States District Court in which this action was commenced and is now pending,

before whom it is to be heard has a bias or prejudice in favor of the Mackinac Bridge Authority, plaintiff herein, and the reason for such belief is as follows:

"(a) The plaintiff in this case is represented by the legal firm of Miller, Canfield, Paddock and Stone of Detroit, Michigan.

"(b) Mr. George Bushnell, Sr. acts as counsel for said firm and his son, George E. Bushnell, Jr., is an active member of said firm.

"(c) George E. Bushnell, Jr. is active in all matters pertaining to this case and it was announced more than a year ago that he will act as trial attorney for the plaintiff in this case.

"(d) Mr. George E. Bushnell, Sr. is the Sovereign Grand Commander of the Ancient Accepted Scottish Rite of Free Masonry for the Northern Masonic jurisdiction of the United States of America.

"(e) That the highest degree awarded by the Scottish Rite of Free Masonry is the 33rd Degree so-called; it is honorary in character and a matter of great value to members of the Masonic Fraternity, and so regarded, as well by non-members thereof; and further, that George E. Bushnell, Jr. has already been awarded honorary membership in the Supreme Council 33rd Degree Valley of Detroit.

"(f) Honorable W. Wallace Kent recently was Grand Master of the Grand Lodge Free and Accepted Masons of the State of Michigan, and at this date is a member of the Secret Fraternal organization of which said Mr. Bushnell, Sr. is and was the Sovereign Grand Commander; and that the said Judge W. Wallace Kent has been offered and has accepted, subject to the conferring thereof, an honorary membership of the Supreme

Council 33rd Degree of said Ancient Scottish Rite of Free Masonry; that conferring of said Degree will be conducted in proceedings in a secret meeting in Philadelphia, Pennsylvania, which will commence on or about September 24, 1962, all to the best of this deponent's knowledge and belief.

"(g) That this deponent is informed that said honorary degree was offered to Judge W. Wallace Kent during the pendency of this litigation and after the commencement thereof, and this deponent believes that the trial judge should either have refused that high honorary degree so long as the present counsel represented plaintiff and this case was pending, or the trial judge, upon agreeing to accept said high honor, should have voluntarily withdrawn from this case, and further, that to the best of this deponent's knowledge and belief, the offer of the high honor referred to above to the said Judge W. Wallace Kent could not have been made without the knowledge and consent of the said Sovereign Grand Commander George E. Bushnell, Sr.

"(h) That these facts having occurred, and whether or not the said Judge W. Wallace Kent should now refuse said high honor, his relationships aside from this court room in the respects narrated in the foregoing, should disqualify him because of bias or prejudice in favor of plaintiff.

"(i) That the prejudice and bias claimed by this deponent for defendant, Merritt-Chapman & Scott Corporation to the best of deponent's knowledge and belief has already been demonstrated in certain ways to the benefit of plaintiff and to the irreparable detriment of defendant, Merritt-Chapman & Scott Corporation, and that the said trial Judge W. Wallace Kent has made it impossible for defendant, Merritt-Chapman & Scott Corporation, to complete its present discovery proceedings, as well as further discovery proceedings prior to the

date again set within the past few days by the said trial judge.

"(j) Deponent again states every fact herein, and that by reason of the foregoing facts said trial Judge W. Wallace Kent is disqualified to continue in this action.

"(k) If these facts had been disclosed to this deponent at an earlier date, defendant Merritt-Chapman & Scott Corporation would have filed an affidavit of prejudice thereupon in connection therewith.

"Further deponent sayeth not.

S Myles C. Mc Gough
Myles C. Mc Gough

"Subscribed and sworn to before me this 17th day of September, 1962.

S William C. Finneran, Jr.
William C. Finneran, Jr.
Notray Public, State of
New York
No. 60-1221150.
Comm. Exp. 3 30 63"

14. The sole question raised by the affidavit rests upon the fact that outside of the courtroom respondent was going to receive an honor of great value,—at the hands of a person listed as a part of opposing counsel's firm, who was also the Sovereign Grand Commander of the Scottish Rite,—which would enable him to join a group of distinguished citizens, and the respondent, at the hearing on September 21, 1962, had the audacity to make an unseemly reference to the Chief Justice of the United States, which reference was so phrased as to suggest that the affidavit included the Chief Justice.

15. A simple reading of the affidavit and the transcript of the proceedings on September 21, 1962, (Appendix D) will establish that respondent, after admitting that he must accept as true the facts stated in the petitioner's affidavit, immediately went behind the affidavit and sought to make it appear that petitioner's affidavit was an assault upon all Masonry, when as a matter of fact it was a motion against the respondent and personal only as to respondent.

16. As already indicated, the bias and prejudice claimed by the deponent had already demonstrated itself to the benefit of the plaintiff and the irreparable detriment of defendant, Merritt-Chapman & Scott, petitioner.

17. Respondent admitted he planned to participate in secret fraternal proceedings in Philadelphia, Pennsylvania, and he did participate, during at least most of the working week of September 24, 1962. In any event, he was not available after Sunday, September 23, 1962, and hotel accommodations in Philadelphia had been reserved as early as June, 1962, at the same hotel as plaintiff's attorney. Whether plaintiff's trial attorney, Geo. E. Bushnell, Jr. participated is not a matter of certainty, although his father was required to preside and, so far as petitioner can ascertain, did preside.

18. On September 21, upon the hearing of the affidavit of bias and prejudice and its accompanying motion, respondent denied both the affidavit and motion on the basis of statements of fact which he made concerning Freemasonry generally, and the Scottish Rite in particular, (although no attack had been made upon the Masonic Order, and just the opposite was stated in the affidavit).

19. Respondent further stated the motion was not timely because of facts which he stated an attorney of petitioner had notice of, or should have had notice of, and he concluded that this notice was binding upon petitioner, although even if respondent's claims were true, only the party litigant and not his attorney can make an affidavit of bias and prejudice.

20. If the same latitude which respondent assumed in going outside of the record is followed in this case, the record of claims of bias and prejudice of respondent in other matters is available, for example, the opinion of the Sixth Circuit Court of Appeals in *United States District Court* v. *Bradt*, Sept. 21, 1961, 294 F.2d 879, which amounts to a serious castigation of same respondent, and considered with petitioner's affidavit of bias and prejudice in the instant case, almost exactly a year later, seriously questions the ability of respondent to act upon the bench in an impartial manner upon questions inherent in the magnitude and complexities of this case.

21. In the same proceeding in which respondent denied the affidavit of bias and prejudice, he dictated upon the record his opinion denying the motion of petitioner that plaintiff be deemed to have admitted requests for admission of petitioner by reason of failure to answer within the time ordered, although he admitted that he had, without prior notice, on August 10, 1962, given the plaintiff ten days' continuance before it was again in default, and the record shows that at least ninety days elapsed between the time that petitioner's original 327 requests were filed and September 21, 1962, when respondent ruled on petitioner's motion, and there then remained but nine days before the date when respondent continued to be insistent the case was

to be tried upon Oct. 1, 1962, and that situation, upon petition for mandamus to the Circuit Court of Appeals, led to the intervention of that Court by a stay of proceedings. (Appendix D)

22. As a part of petitioner's petition for a writ of prohibition in the Court of Appeals, it alleged that the bias and prejudice of respondent were clearly demonstrated in the fact that respondent criticized petitioner at the same proceeding for petitioner's motion resulting from plaintiff's failure to answer its requests for admissions earlier than the time respondent had gratuitously extended, *but respondent did not criticize plaintiff, which was in default, for its delays*, and made no favorable comment upon the fact that petitioner had offered, and plaintiff had accepted the offer, to examine petitioner's records and files which were the basis for its requests for admissions.

23. Respondent went entirely outside of the record to comment upon the fact that the Chief Justice of the United States, among others, is a 33rd Degree Mason and that unseemly reference by respondent has been accepted by petitioner as an attempt to induce fear upon petitioner that it should not pursue the matter contained in its affidavit of bias and prejudice.

24. In respondent's same opinion, a part of the prejudicial hearing, respondent further noted critically that counsel for petitioner had not given any indication in the chamber hearing of August 10, 1962, of its intent to exact the "procedural penalty of default," but he admitted lack of prior notice to petitioner for an extension, and petitioner's refusal to agree, but respondent did not and has not to this date entered any order to substantiate the extension given.

25. Therefore, respondent's statement that petitioner's motion came as a complete surprise to him and that *he assumed* "it was an equal surprisse to counsel for plaintiff," is certainly biased, since respondent was well aware of the extent to which plaintiff's responses had been delayed with assistance of respondent's order and the effect of that delay upon any possibilty of petitioner completing its discovery under Rule 36 prior to October 1, 1962, the date respondent had been adamant in setting for trial, *and respondent also knew that petitioner, on August 17, 1962, had refused in writing to stipulate any further extension* as respondent was surprised on Sept. 21, 1962, *both for himself and for plaintiff!* Petitioner's attorney would not, at that point, have been at all surprised if respondent had then and there announced himself as co-counsel for plaintiff.

26. Respondent's personal bias and prejudice were further evidenced in the hearing on September 21, 1962, by his direct characterization of petitioner's motion of August 21, 1962, as "trial by ambush",—meaning stealth, trickery and device to entrap.

27. On the same day, September 21, 1962, that respondent denied petitioner's affidavit of prejudice, petitioner caused to be delivered to the respondent, at his home in Kalamazoo, a motion for continuance in which it set forth the necessity that it be allowed further time in connection with its discovery proceedings. Respondent refused to accept petitioner's motion at his residence, but directed that the motion be filed the following day, September 22, 1962, and he was positive in stating that the motion for continuance could not be heard until date of trial, October 1, 1962. (A copy of said motion is attached hereto as Appendix E.)

28. Because of the impossibility of completing discovery proceedings under the orders of the court, petitioner, upon September 26, 1962, filed with the Sixth Circuit Court of Appeals a petition for mandamus praying for a continuance, and upon the filing, a stay of proceedings was granted by that court pending determination of said petition. The order staying the proceeding read as follows:

> "IT IS ORDERED that the Respondent, the Honorable W. Wallace Kent, United States District Judge for the Western District of Michigan, show cause, if any he had, on or before October 15, 1962, why the prayer of said petition should not be granted, and until said petition has been heard and determined, further proceedings in the action in the District Court are stayed."

29. On October 12, 1962, the court amended the stay of proceedings as follows:

> "IT IS ORDERED by the Court, sua sponte, that the stay heretofore granted herein be modified so as to stay only the trial of the case in the District Court on its merits, leaving the court and the parties free to proceed in respect to all other matters."

30. Because of the antagonistic, partial and even vehement attitude of respondent, petitioner has to this date feared that respondent could not consider any further pretrial motions and matters without personal bias and prejudice.

31. The answer to that petition for mandamus was not executed by respondent, but an answer was filed signed by George E. Bushnell, Jr., appearing as his attorney, (who with his firm is understood to be upon a speculative fee basis with plaintiff of Public Au-

thority, and if so, would have a direct financial interest in the outcome), and that answer did not specifically reply to the petition filed. By reason of the failure of respondent to reply to the following allegations of said petition for mandamus, the respondent admitted the following:

> "Further, that the trial judge, by arbitrarily limiting discovery procedures, by informally allowing extensions of time to the Plaintiff for its responses under Rule 36, by denying Petitioner's Motion for an Order that the Plaintiff be deemed, pursuant to the plain language of Rule 36, to have admitted the Petitioner's Requests for Admissions by failing to act promptly with respect to your Pefitioner's Motion dated August 20, 1962, and by treating the requirement of Rule 36 as being suggestive and directory rather than mandatory, and by setting the trial of this cause on October 1, 1962, and by failing to grant your Petitioner a continuance beyond that date for the reasons set forth in that Motion, and for the facts as related in this Petition, has effectively and completely denied to your Petitioner its right to a fair and reasonable use of the discovery procedures referred to as a basis for its preparation for trial, including consultation with experts, and that unless a continuance is ordered by this Court, your Petitioner will be irreparably damaged."

and the petition further alleged that the facts referred to had resulted in an obvious and complete deterioration of normal relations between petitioner and trial judge, and that allegation has never been denied.

32. The transcript of the proceedings on September 21, 1962, which lasted less than one hour, was not received from the trial court reporter until October 16, 1962. It appears the court reporter was given leave

by respondent for the week of September 24, 1962, while respondent was in Philadelphia, after respondent had repeatedly stated, both on and off the record, that the business of the court would not allow any further pre-trial hearing.

33. Although the petition for mandamus which was pending before the Circuit Court of Appeals had not been decided, petitioner after receipt of transcript, commenced its preparation of a petition for writ of prohibition which it filed with the Circuit Court of Appeals on November 10, 1962, in which it referred to the relief granted by the Circuit Court of Appeals Order of September 27, 1962, and petitioner asked that Court to take judicial notice of the record in the mandamus proceedings,—which it apparently did,—at least no objection has ever been made by respondent or by the Court of Appeals.

34. The petition for prohibition was based not only upon respondent's denial of the motion and affidavit of prejudice, but also upon the other facts and circumstances above referred to which indicate that there was bias and prejudice on the part of respondent. It is the duty of the Court of Appeals, to make inquiry into complaints against a trial judge, not for the benefit of any party litigant, but in order to preserve the integrity and the freedom from personal prejudice and bais in the functioning of the trial courts.

35. On November 19, 1962, the Sixth Circuit Court of Appeals, conditionally, denied petitioner's petition for writ of mandamus and allowed respondent to proceed with the hearing of petitioner's motion for continuance before respondent.

36. In the opinion of the court upon mandamus, it apparently proceeded upon the assumption that peti-

tioner had had sufficient continuance, but it gave no weight to petitioner's intense fear of the complete partiality of respondent, and this continues to be the situation in connection with any hearing upon any petition or motion arising out of plaintiff's failure to respond to petitioner's 372 Requests for Admission under Rule 36 (Federal Rules of Civil Procedure); any hearing directed to plaintiff's Amended Complaint; any hearing upon petitioner's amendment of its Motion for Summary Judgment; any rulings which respondent might be called upon to make in connection with questions on depositions taken by petitioner of persons within the jurisdiction, because of refusals of the person being questioned to answer or because of evasive answers. In this latter respect the mere fact that matters were pending before the Circuit Court of Appeals had a restraining influence.

37. Respondent required the presence of petitioner's attorney at a hearing in Marquette, 1:30 P.M., December 17, 1962, and made no change in the date in spite of petitioner's application thereafter made to the Court of Appeals—for stay of proceedings. A qualified denial of stay of proceedings by the Circuit Court of Appeals was telephonically received on December 14, 1962. Copy of order was received December 17, 1962 at Grand Rapids.

38. The only business of the trial court, so far as could be ascertained involved petitioner's motion for continuance dated September 21, 1962,—a hearing of less than an hour,—and a short hearing involving Rule 20, Rules of Criminal Procedure, etc.

39. Petitioner was subjected to great expense and effort to make the trip to Marquette upon its motion, although more important matters had been disposed of

in Grand Rapids, Michigan, and, although petitioner claimed it did not, in view of respondent's knowledge of this petition, desire to be placed in any position wherein respondent could claim that petitioner had injured its position as to the instant matter, respondent gave petitioner every assurance that petitioner was saving its position as though respondent were the United States Supreme Court all by himself.

40. On November 26, 1962, the Circuit Court of Appeals denied Merritt's Petition for Writ of Prohibition "on the authority of Samuel G. Albert vs. United States District Court for the Western District of Michigan, Northern Division, 283 F.2d 61 (CA 6, 1960), cert. denied 265 U.S. 828 (1961)." (Copy of opinion attached as Appendix F.)

41. Reference to the Albert case cited shows that that was an original action in mandamus or prohibition or both to compel this same respondent to certify his disqualification to hear a certain pending action and to prohibit him from conducting further proceedings therein because of his personal bias and prejudice.

42. The basis for petition was the denial by the district judge of the affidavit. In that case the Court of Appeals, on the authority of *Collier* v. *Picard*, 237 F.2d (CA 1956), held that the order of the district judge in refusing to disqualify himself was not reviewable upon appeal until after final judgment had been entered. In the *Albert* case the court did not make any distinction between the direct appeal in the *Collier* case, which it cited, and the fact that the *Albert* case was an original action filed with it. It is interesting to note, that *Williams* v. *Kent*, 216 F.2d 342 in the Sixth Circuit Court of Appeals involves the same trial judge.

43. Further, in the *Albert* case after a consideration of the general nature of a mandamus action, the court stated that the action of the trial judge with respect to the affidavit of prejudice and bias was a judicial act and that mandamus was not a proper remedy to compel a judge to recuse himself, and in support of that statement it relied upon *Green* v. *Murphy*, 259 F.2d (CA 1954); *Korer* v. *Hoffman*, 212 F.2d 211 (CA 7, 1954); and *Hurd* v. *Letts*, 152 F.2d 121 (CADC 1945). The cases cited support the statement made in the *Albert* case. (A copy of the opinion in *Albert* v. *United States District Court*, 283 F.2d 61 (CA 6, 1960) cert. denied, 265 U.S. 828 (1961) is attached hereto as Appendix F.)

44. Upon application to the Circuit Court of Appeals for stay of proceedings pending this petition for certiorari, the petition was denied, however, "without prejudice to renewal of the motion, in the event the District Court assigns the case for trial before the Supreme Court has acted." (Copy of that order is attached as Appendix G.)

45. The Sixth Circuit Court of Appeals used the *Albert* case as authority for taking a position in this case which that case does not support. In using the *Albert* case the Sixth Circuit has now joined those circuits holding categorically that denial by a district judge of a motion to disqualify upon an affidavit of prejudice is not reviewable in an original action for mandamus or prohibition before the Circuit Court of Appeals. In the present case the court aligned itself with the *Green* and *Korer* and *Hurd* cases. It refused to pass upon the sufficiency of the allegations in the affidavit of bias and prejudice.

(g) BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based upon the fact that Civil Action #761 was between citizens of different states and the matter in controversy exceeded the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and the District Court had jurisdiction thereof under Section 1332, 28 United States Code Annotated.

(h) REASONS SUPPORTING REVIEW BY THIS COURT ON CERTIORARI

In the construction of Section 144 and 1651 (a) 28 U.S.C.A. involving the application of those sections to proceedings in connection with the filing and review of affidavits of bias and prejudice and accompanying motions to disqualify, the decisions of the United States District Courts and the United States Court of Appeals are in conflict with each other and with the decisions of this court in respect thereto. Also, by reason of said conflict, the Circuit Court of Appeals for the Sixth Circuit has so far sanctioned a departure from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(i) ARGUMENT IN SUPPORT OF REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons stated above for the exercise of its jurisdiction actually arise from a conflict in the interpretation of two different sections of the Judicial Code. The first of these sections, present section 144, former Section 25, of the Judicial Code, 28 U.S.C.A., states the conditions surrounding the use of an affidavit of prejudice and bias, and that section reads as follows:

"Bias or prejudice of judge.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." As amended May 24, 1949, c. 139, paragraph 65, 63 Stat. 99.

The second section of the Judicial Code which we refer to, Section 1651(a), 28 U.S.C.A., is directly involved by the interpretation which the appellate courts have made of their power or lack of power under that section with respect to original petitions for writs of mandamus or prohibition based upon a claim that a United States District Judge is biased or prejudiced.

In the construction of Section 144, decisions of the appellate courts, and the decision of the appellate court in this case, are at variance with the decisions of this court and with the decisions of other Circuit Courts of Appeals.

In *Berger* v. *The United States*, 255 U.S. 22, this court construed Section 144, (then Section 21) upon an appeal after sentence and conviction in the District

Court. The question before the court was stated substantially as follows:

> Under Section 21 (now Section 144, 28 United States Code Annotated), what is the duty and power of the trial judge against whom an affidavit of bias and prejudice is filed? Does a filing of an affidavit of personal bias and prejudice compel his retirement from the case or can he exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

Between the adoption of this section of the Judicial Code in 1911 and a consideration of the section in the Berger case, two previous decisions of the court, *Glasgow* vs. *Moyer*, 225 U.S. 420, and *Ex parte American Steel Barrel Company and Seaman*, 230 U.S. 35, had referred to that section. In the *Glasgow* case the section was not passed upon, and in *Ex parte American Steel Barrel Company and Seaman*, the phase of the section before this court in the *Berger* case was not presented. The result was that this court in the *Berger* case stated that the issue presented was practically of first impression.

In referring to previous cases in the circuit construing Section 21, the court quoted the following language from *Henry* vs. *Speer*, 201 Fed. 869 (CCA 5):

> "Upon the making and filing by a party of an affidavit under the provisions of Section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient, then he has no other or further duty to perform than that described in Section 20 of the Judicial Code. He is

> relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

After quoting the words of the statute the Court said,

> "There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction, its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of a designation of another."

As to the claim that the purpose of the requirement was to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant, this court said,

> "It is in effect urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and other less extensive use as pointed out by Judge Meek in *Henry* vs. *Speer supra*. It is a precaution against abuse, removes the averments and beliefs from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of

the penalties attached to perjury. Nor do we take that this view gives room for frivolous affidavits. Of course, the reasons and facts for the beliefs the litigant entertains are an essential part of the affidavit, and must give full support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of the defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward the defendants."

And then speaking for the court, Mr. Justice McKenna says,

"But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate, we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. *Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed 'shall be designated in the manner prescribed in the section last preceeding, or chosen in the manner prescribed in Section 23 to hear such matter.'* And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The*

> *remedy by appeal is inadequate. It comes after trial, and if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.*" (Italics ours.)

The opinion of this court in the *Berger* case is cited in practically every case which we have examined, which involves the use of an affidavit of prejudice and bias or a review of the action of the District Court with respect to such an affidavit.

Some of the Circuit Courts of Appeals appear to have been unhappy with the interpretation of the statute by this court to such an extent that they have sought various ways in which to avoid the impact of the *Berger* decision. They have seized upon its language that the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," and have interpreted that language to mean that the judge against whom the affidavit is filed actually has, in direct contradiction to the language in *Henry* vs. *Speer*, "the delicate and trying duty of deciding upon the question of his own disqualification," so that respondent, who stated that he could not "in good conscience" * * * "on the basis of this affidavit * * * gracefully bow out," admitted that he would be unavailable for the week of September 24, 1962, when presumably he received the high honor referred to at the hands of the Sovereign Grand Commander without whose approval he could not have received it. If the question of the withdrawal of a judge for bias and prejudice is deleted, as it has been by some judicial decisions, from the application of clear and unambiguous provisions of the act of Congress referred

to and is left to rest upon the "good conscience" of the trial judge, a result like this, which reflects upon the entire judicial system, may well be expected.

While the opinions of the appellate courts refer to the power of the judge against whom the affidavit is filed to pass upon the legal sufficiency of the affidavit, they actually interpret that language to mean that the judge shall pass upon the question whether in his opinion the affidavit does actually prove that he is guilty of a bent of mind which prevents impartiality of judgment.

Actually that is what respondent held the statute meant in the instant case. He denied the affidavit of prejudice because he found "nothing in this affidavit which would be sufficient to demonstrate that there is a prejudice of such a character as would show 'a bent of mind that may prevent or impede impartiality of judgment' as to the justifiable matter which is before the court," and he unconcernedly went on his way to Philadelphia. The Sixth Circuit Court of Appeals, without passing upon the sufficiency of the allegations in the affidavit of bias and prejudice or of the petition for writ of prohibition in which the denial by Judge Kent of the affidavit of prejudice and bias for these reasons was a substantial part of the basis for the petition for the writ, denied the petition without reference to the affidavit.

In *Green* vs. *Murphy*, 259 F.2d 591, the action of trial judges in disregarding the clear provisions of Section 144 is evident in the following language, page 503:

> "A United States District Judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from

the case by reason of the allegations of his disqualification contained in the affidavit. This necessarily includes the power to decide the question wrongly as well as rightly."

The foregoing language is a far cry from the meaning and intent of the language of the *Berger* case, and is (with the possible exception of Judge Kalodner's strong dissent) an excellent example wherein by the attrition of judicial decisions, the act of Congress and the opinion in the *Berger* case have been completely emasculated.

Whatever may be the reason why a Circuit Court of Appeals has taken this view of Section 144, certainly its construction conflicts with the view of this court in the *Berger* case. The importance of *Green* vs. *Murphy* is evident from the fact that it was cited as a controlling opinion in the case of *Albert* vs. *United States District Judge*, 283 F.2d 61, and through the opinion in that case became a controlling opinion in the denial by the Sixth Circuit Court of Appeals of the petition for writ of prohibition in the instant case.

Under the authority of *Egan* vs. *The City of Aurora et al*, 365 U.S. 514, because of a conflict between the decisions of the appellate courts and this court, your petitioner submits that its petition for certiorari should be granted.

However, the conflict of opinions in the interpretation of Section 144 in support of the petition for certiorari does not stand alone in this case. It would be serious enough if all that was involved was a misinterpretation of the meaning and application of Section 144, but that misinterpretation has been coupled with a refusal on the part of the appellate courts to recog-

nize that Section 1651 (a) 28 U.S.C.A., gives them power to pass upon whether or not the District Judge has ruled properly upon the legal sufficiency of the affidavit of prejudice, prior to the time that the matter has been heard upon the merits and an appeal taken, so that appellate courts are holding not only that the judge against whom the affidavit of prejudice and bias is filed must determine whether or not it shows a bent of mind which prevents his impartially deciding the matter before him, but also that the decision that he makes on that point will not be reviewed by the appellate court until after that same judge has tried the case and it has been appealed. That was what was held in *Green* vs. *Murphy*, 259 F.2d 591, in *Korer* vs. *Hoffman*, 212 F.2d 211, and in *Hurd* vs. *Letts*, 152 F.2d 121.

In this same line of authority is the *Albert* case, above referred to, on the authority of which the within petition was denied. In the *Albert* case it was held that the action of the trial judge with respect to denying an affidavit of prejudice and bias could be reviewed only upon appeal and not upon petition for prohibition or mandamus.

Of the seven judges who sat in *Green* vs. *Murphy*, three were not satisfied with the result which was reached. There was a concurring opinion on the part of two judges to the effect that it was improper for the majority not to consider and review the sufficiency of the affidavit of prejudice involved in that case. The two who concurred contended that the appellate court should review the sufficiency of the affidavit, and then proceeded to do so. The third judge, Judge Kalodner, filed a dissenting opinion to the effect that the writ should be issued.

In that opinion Judge Kaloshner emphasized the direct conflict between the majority opinion of *Green* vs. *Murphy* and this court's opinion in the *Berger* case. He called attention to the fact that the decision in *Green* vs. *Murphy* was *contra* to the views expressed by the following Courts of Appeals in the following language (page 598):

> "Before doing so, I must immediately state that the majority's view that it cannot consider and act upon Judge Murphy's disqualification until after Green has been convicted (should that transpire) and he has appealed from that conviction to this court, is in complete disregard of Berger v. United States, 1927, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 and contra to the views expressed by the following Courts of Appeals:
>
> "*District of Columbia Circuit*
> Barsky v. Holtzoo, No. 126 Misc. April Term, 1947;
>
> *Second Circuit*
> In re Lisman, 1937, 89 F.2d 898; Foster v. Medina, 1948, 170 F.2d 632, certiorari denied 1949, 335 U.S. 909, 69 S. Ct. 412, 93 L. Ed. 442;
>
> *Fifth Circuit*
> Henry v. Speer, 1913, 201 F. 869;
>
> *Sixth Circuit*
> Williams v. Kent, 1954, 216 F.2d 342;
>
> *Eighth Circuit*
> Cuddy v. Otis, 1929, 33 F.2d 577; Minnesota & Ontario Paper Co. v. Molyneaux, 1934, 70 F.2d 762.
>
> "In the instances cited, applications for writs of mandamus and/or prohibition, based on bias and prejudice, were entertained affecting pending litigation in the district courts which had not attained

the status of final disposition and/or appealability."

Among the cases cited above is the case of *Williams* vs. *Kent*, 1954, 216 F.2d 342, in the Sixth Circuit where the Court, assuming its power to act, held that the affidavit of prejudice was not legally sufficient.

In one of the two cases in the Ninth Circuit referred to, the writ was granted Connelly, and in the other case, *Gladstein*, it was held that mandamus was a proper remedy where a District Judge had refused to disqualify himself after the filing of an affidavit of prejudice.

Judge Kalodner pointed out that in the Third Circuit also there exists a conflict in that in *In Re Green*, 160 F.2d 517, 519, the court considered and denied on the merits an application for writ of mandamus or prohibition based on bias, in a pending proceeding, although it specifically reserved for future decision the point as to whether the writ could issue in a meritorious case, whereas in *Green* vs. *Murphy*, it held review could be had only on appeal.

It is well established that the jurisdiction of the appellate court under paragraph 1651 (a) does not depend upon whether or not there is an appeal pending but depends upon whether there is a matter pending over which the appellate court in question would have appellate jurisdiction. *Minnesota and Ontario Paper Company et al* vs. *Molyneaux*, 70 F.2d 545, *Ex parte United States*, 287 U.S. 241, *La Buy* vs. *Howes Leather Company*, 352 U.S. 241.

The conflict becomes even more apparent when one considers that the Sixth Circuit Court of Appeals held under the All Writs Statute that it had the power to

issue a writ of mandamus where the right of jury trial was involved, *Black* vs. *Boyd*, 248 F.2d 156, while in the instant case it is held that it does not have the power to inquire into the propriety of a judge's action in denying an affidavit of prejudice and bias.

In addition to those cases, on the one hand, which like *Green* vs. *Murphy* have decided that Section 1651 does not apply where the basis for the petition is the bias and prejudice of the trial judge, and *Connelly* vs. *United States*, to the contrary, where the appellate court has decided that it does apply in a case of that type and that it is proper to issue a writ in that situation, there are a number of cases which represent an area which may be properly called "non-decision." These cases recognize the seriousness of the situation where the bias and prejudice of the trial judge is involved, and they pass over, without deciding, the question of the power to issue such a writ by using the phrase that they "assume" they have the power to consider the petition and then proceed to consider the petition on the merits. *Williams* vs. *Kent*, 216 F.2d 342, above referred to, in the Sixth Circuit, is a case of this kind. See also, *In re Union Leader Corporation*, CCA 1, 292 F.2d 381 (1961); *In re United Shoe Machinery Corporation*, CCA 1, 276 F.2d 77 (1960); *In re Lisman et al*, CCA 2, 89 F.2d 989; *Minnesota and Ontario Paper Company* vs. *Molyneaux*, 70 F.2d 545, CCA 8.

Why the Sixth Circuit Court of Appeals changed its practice and decided to adopt in this case the rule in *Green* vs. *Murphy* and to deny the petition for prohibition without any consideration on the merits, is not clear.

The impact of the opinion of the concurring judges in *Green* vs. *Murphy supra* and of Justice Clark's opinion in *La Buy* vs. *Howes Leather Company supra* is reflected in the recent opinion of the First Circuit Court of Appeals in the case of *In Re Union Leader Corporation*, 292 F.2d 381. There the court reconsidered its earlier opinion of *In Re Josephson*, 218 F.2d 174, 177, and said:

> "It now seems clear however that In Re Josephson we construed the words 'in aid of * * * jurisdiction' too narrowly. See *La Buy* vs. *Howes Leather Company*, 1957, 352 U.S. 249, 255, 77 Supreme Court 309, 1 law edition 2nd 290; Black vs. Sixth Circuit, 1957, 248 F.2d 156, 160-161. In a sense this may merely mean that the emphasis was placed at the wrong point. Our jurisdiction exists, *but we must decide whether there are sufficient reasons for its exercise.*" (Italics ours)

And then on page 384, the court proceeded to make the following statement which is worthy of attention:

> "But we do find exceptional circumstances in the nature of the particular claim advanced by petitioner. A trial taking place before a judge alleged to be personally biased, particularly when the claimed bias has apparently become a matter of public notice and interest, may be incompatible with the proper administration of justice. If the claim is sufficiently meritorious, the proceeding should be aborted rather than corrected. Mandamus has been held to be an appropriate remedy to secure the right to jury trial, at least where the right is clear. *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988; *Ex parte Simons*, 1918, 247 U.S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, and seemingly even where the right is debatable, compare majority opinion *with* dissenting opinion in *Beacon Theatres, Inc* v. *West-*

orer, supra, both at page 511 of 359 U.S., at page 957 of 79 S.Ct. From the general standpoint of the interest of justice, the right to be tried before an unbiased judge is also basic in our judicial system. Although there are differences of opinion, we agree with the concurring judges in *Green* v. *Murphy*, 3 Cir., 1958, 259 F.2d 591, 595, that public confidence in the courts may require that such a question be disposed of at the earliest opportunity. In addition to the cases cited therein, see also *United States* v. *Ritter*, 10 Cir., 1959, 273 F.2d 30, 32, certiorari denied, 362 U.S. 946, 950, 80 S.Ct. 863, 4 L.Ed. 2d 869. This need not commit us to entertaining every rejected affidavit of prejudice; nor need we presently set forth the limits. It is to be borne in mind that mandamus is a discretionary writ."

Not only is there this conflict between the courts as to the question of power under Section 1651 (a) as applied to petitions for mandamus or prohibition resulting from the filing and denial of affidavits of bias and prejudice, but also it is true in jurisdictions like that of the Sixth Circuit, the question of the propriety of the district judge's action with respect to the affidavit of bias and prejudice will not be heard until after judgment on the merits and appeal therefrom. Petitioner submits that the conflict is so serious as to require the issuance of a writ of certiorari as a matter of appellate review and also is of such importance as to require the use of supervisory power of this court under the All Writs Statute.

In *Moore's Federal Practice* at paragraph 54 and subparagraphs thereof, a strong argument is made for more flexibility in the use by appellate courts of the power given to them under Section 1651 (a). On page 68 Moore summarizes the situation as follows:

> "But unless the term finality is to be warped, twisted, dragooned, and ballooned in disregard of common understanding, the final judgment rule and the statutory provisions for interlocutory orders that are non-appealable, but, nevertheless, are of such a character that postponement of review until the final judgment state is productive of injustice because of an undue impairment of a legal right, or unnecessary delay, expense, hardship, or other related factors. And here is where the All Writs Statute, Section 1651, can serve a very useful function. The problem for the appellate court is to balance the sound policy behind the general rule of finality against the claim of the individual case that justice demands a present review of the particular non-appealable interlocutory order. And in resolving the balance for or against review, it is well to recall that the power of review is present under 1651, to be used by the appellate court in the exercise of a sound discretion; and the flexibility of such discretionary review is on the whole better than enlarging the categories of interlocutory orders that are appealable as of right."

As to the merits of the original petition for writ of prohibition, the facts alleged in the affidavit of bias and prejudice, and the additional facts stated in the petition for writ of prohibition, disclose such relationships between the trial judge and certain of the plaintiff's counsel and such an attitude of mind on the part of the trial judge as to support a reasonable belief that he has personal prejudice in favor of the attorneys for the Mackinac Bridge Authority—and therefore in favor of the Mackinac Bridge Authority—which so destroys the fact and the appearance of impartiality as to disqualify him from continuing to preside as trial judge in the original case, and neither the affidavit nor the

record supports the trial judge's holding that the filing of the affidavit was not timely.

CONCLUSION

Petitioner submits, under Rule 19 of this court, that there is a conflict between the decisions of the appellate courts, and between the decisions of the appellate courts and this court, with reference to the proper interpretation of Sections 144 and 1651 (a) of United States Code Annotated and, second, that the conflict is of extreme importance in the entire federal judicial system in the way in which bias and prejudice of a judge of the district court is treated.

It is submitted that the purpose and intent of Congress in enacting the original Section 21 (present Section 144, 28 United States Code Annotated), as stated by this court in the *Berger* case will be nullified unless the within petition for writ of certiorari is granted.

In the *Albert* case the Sixth Circuit Court of Appeals closed the door upon the affidavit of bias and prejudice, but after it had closed the door it did review the affidavit and held it to be legally insufficient. In the instant case it has held that the door is not only closed until after the appeal on the merits but also that the appellate court has no power to open that door prior to that time.

The enlightened interpretation by this court of Section 21 of the Judicial Code (now Section 144), in the *Berger* case, has now been completely emasculated by a process of attrition through judicial decisions to which we have referred which have continually become narrower and more inflexible.

If the personal background and relationship set forth in the affidavit of bias and prejudice, which have arisen and continued during the pendency of this case, are objectionable, then that should be stated. If the facts appearing from the affidavit reasonably support the claim of personal bias and prejudice, that should be stated. But petitioner should not be required to go to trial before the respondent before his denial of the affidavit of bias and prejudice has been reviewed.

Above these conflicting decisions, accumulated over a period of more than fifty years, there should now arise a reaffirmation of those principles stated in the *Berger* case as necessary to the public respect for the judicial function so that the matter of the bias and prejudice of a district judge will not continue to be dependent upon so illusory a concept as what the trial judge believes should be required by his own "good conscience."

Dated:

JOSEPH F. DEEB
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Dated Feb 25, 1963

APPENDIX A

Filed Nov. 26, 1962

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,496

In the Matter of

MERRITT-CHAPMAN & SCOTT CORPORATION, *Petitioner*

v.

HONORABLE W. WALLACE KENT, United States District Judge for the Western District of Michigan, *Respondent*.

Order

Before: CECIL, Chief Judge, MILLER and WEICK, Circuit Judges.

Upon consideration,

IT IS ORDERED that the petition to prohibit respondent from continuing as trial judge in the case of Mackinac Bridge Authority v. Merritt-Chapman & Scott Corporation, et al. be denied on the authority of *Samuel G. Albert v. United States District Court for the Western District of Michigan, Northern Division*, 283 F. 2d 61 (CA 6, 1960), cert. denied 365 U.S. 828 (1961).

PAUL C. WEICK
United States Circuit Judge

APPENDIX B

UNITED STATES OF AMERICA
THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY, a Michigan municipal corporation, *Plaintiff*,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION, a New York corporation, and

PRE-PAKT CONCRETE COMPANY, an Ohio corporation, *Defendants*.

Motion to Dismiss Counts 2 to 7 Inclusive of Plaintiff's Complaint, or in the Alternative, to Require Amendment Thereof

NOW COMES the above named Defendant, Merritt-Chapman & Scott Corporation herein referred to as Merritt, and moves, that Counts 2 to 7 inclusive of the Complaint filed by Plaintiff, Mackinac Bridge Authority, also referred to herein as the Authority, be dismissed because of its failure to state in separate counts the separate claims of the Plaintiff as required in Rule 10B of the Federal Rules of Civil Procedure, or, in the alternative, to require Plaintiff to amend Counts 2 to 7 inclusive of its Complaint, to conform to the requirements of said Rule that each claim founded in a separate transaction be stated in a separate count whenever a separation facilitates the clear presentation of the matters set forth, and if an Order to Amend is made and Plaintiff does conform, then Merritt moves that it be allowed a further time in which to answer the Complaint as amended.

The grounds for this motion are as follows:

1. By the use of the principle of incorporation by reference; all of the Plaintiff's counts, subsequent to Count 1, state from two up to seven claims, which claims are not stated alternately or hypothetically, and said claims sound in contract and for tort and for breach of warranty. Specifically the claims thus stated cumulate as follows:

COUNT TWO includes the claim of Count One for breach of contract by Merritt and Pre-Pakt, and adds claim of breach of Merritt of duty to exercise due care in performance of contract "commensurate with that of a reasonably prudent person in the occupation and under these circumstances" and alleges both negligence and gross negligence.

COUNT THREE includes claim of breach of contract of Merritt and Pre-Pakt under Count One, claim of negligence and gross negligence of Merritt under Count Two and adds claim of negligence against Pre-Pakt.

COUNT FOUR includes claim of joint breach of contract in Count One, negligence of Merritt in Count Two, negligence of Pre-Pakt in Count Three and adds claim that Merritt and Pre-Pakt breached their duty "by their gross and wanton neglect to use that degree of care required in the premises."

COUNT FIVE includes all of claims made in preceding counts of joint breach of contract and joint and several negligence and adds claim of warranty by Merritt and Pre-Pakt of quality and fitness for purpose of all materials supplied by them and failure of materials to conform to alleged warranties.

COUNT SIX includes preceding claims of breach of contract, joint and several negligence and negligence and

breach of warranty and adds claim of breach by Merritt and Pre-Pakt of alleged express and implied warranties of the method of mixing and laying cement and that the same "would be free of latent and patent defect.

COUNT SEVEN includes all of the foregoing claims and adds claim of warranty by Merritt and Pre-Pakt expressly and impliedly by recognition of customs and usages in marine contracting trade as to proper construction and soundness of all caissons and cofferdams, including Pier 17, performance of work according to plans and specifications without latent or patent defects and construction done according to generally recognized standards of trade of marine construction.

2. Such a separation of claims in separate counts is necessary to facilitate a clear presentation of the matters set forth.

3. Unless such a separation of claims is set forth, it will be impossible for Defendant Merritt to amend its Answer to plead intelligently to said counts.

4. The use of such "mongrel" counts is contrary to the purpose and intent of the requirements of Rule 10B.

5. The use of such "mongrel" counts will needlessly complicate the trial of this case and the presentation of the claims of the Plaintiff to the jury, both with respect to the presentation of evidence and the charge of the Court as to such claims, and the rule of damages with respect thereto, if the case is permitted to go to the jury.

6. If the jury should return a verdict for the Plaintiff, it would be impossible to determine upon what basis the verdict was reached, and, if damages were allowed, it would be impossible to determine whether a proper measure of damages had been adopted.

This motion is based upon the files in this case, upon the Federal Rules of Civil Procedure, particularly Rule 10B thereof.

DEEB, DUNN & ELFERDINK
Attorneys for Defendant
Merritt-Chapman & Scott
Corporation

By .....
JOSEPH F. DEEB

Business Address:
600 Michigan Trust Building
Grand Rapids 2, Michigan

MANNING, HOLLINGER & SHEA
Of Counsel

Business Address:
41 East 42nd Street
New York 17, New York

APPENDIX C

"JOSEPH F. DEER, MESSRS. DEER DUNN & ELFERDINK
SUITE 600 MICHIGAN TRUST BLDG GRAND RAPIDS MICH.

I HAVE ADVISED MERRITT CHAPMAN & SCOTT CORPORATION AS TO THE FACTS WHICH YOU HAVE JUST COMMUNICATED TO ME. SOME OF THOSE FACTS WITH RESPECT TO COURT PROCEDURE I KNEW BEFORE OTHER FACTS DEALING WITH THE TRIAL JUDGE'S RELATIONS OUTSIDE OF COURT WITH PLAINTIFF'S COUNSEL WE HAD NOT KNOWN BEFORE. BECAUSE THESE ADDITIONAL FACTS ARE OF SUCH A SERIOUS NATURE VIEWED IN THE LIGHT OF THE REMAINING FACTS REFERRED TO WE REQUEST THAT YOU IMMEDIATELY CONTACT THE COURT AND REQUEST THAT THE COURT HOLD IN ABEYANCE ANY AFFIRMATIVE ACTION IN BEHALF OF THIS DEFENDANT PENDING DETERMINATION AS TO WHAT COURSE IT WILL TAKE WITH RESPECT TO THE TRIAL JUDGE. THAT MATTER SHOULD BE DETERMINED TODAY."

JAMES J. A. GALLAGHER

September 17, 1962

"Honorable W. Wallace Kent
Chief Judge
United States District Court
Federal Building
Grand Rapids 2, Michigan

RE: Mackinac Bridge Authority v. Merritt-Chapman & Scott Corporation and Prepakt Concrete Company. Civil Action 761

"Sir:

"The attached telegram from Mr. James J. A. Gallagher of the firm of Manning, Hollinger & Shea, New York City, representing Merritt-Chapman & Scott Corporation, dated today, indicates at least the possibility of an affidavit of prejudice by Defendant Merritt-Chapman & Scott being filed in this matter, pursuant to the provision of Title 28, U.S.C.A. Sec. 144.

"The authorities are in substantial agreement with the opinion of the Circuit Court of Appeals of this circuit

(*Refior v. Lansing Drop Forge Company*, 124 F. 2d. 440) that the aforesaid statute does not permit a litigant, after he has knowledge of the alleged bias or prejudice and without notice, to go forward in the cause before filing such affidavit, after facts of disqualification are known to him.

"Because of this, notice to this trial court, (including the attached copy of telegram) and even more especially, if an affidavit is filed, it would appear that until the matter referred to in the telegram is disposed of, the present status of the case must be maintained and Defendant Merritt should not ask affirmative action of this Court upon Defendant Merritt's Motion filed August 21, 1962.

Very truly yours,

JOSEPH F. DEEB

J.F.D/wn
1 Enc.

(See addition to this letter, following sheet)

"Honorable W. Wallace Kent September 18, 1962

"P.S. We have delayed service of this notice upon you in an effort to get final word from Merritt as to what its independent decision is as to the filing of Affidavit of Prejudice. We have just been advised that Defendant Merritt desires to file such an affidavit, and the same should be filed today.

J.F.D."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY, a Michigan municipal corporation, *Plaintiff*,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION, a New York corporation,

and

PRE-PAKT CONCRETE COMPANY, an Ohio corporation, *Defendants*.

Transcript of Proceedings

had in the above-entitled cause, before Honorable W. Wallace Kent, Chief Judge, Presiding; Honorable Noel P. Fox, District Judge, and Honorable Raymond W. Starr, Senior Judge, at Grand Rapids, Michigan, on September 21, 1962.

Appearances:

Miller, Canfield, Paddock & Stone, Detroit, Michigan, by Mr. George E. Bushnell, Jr., on behalf of the Plaintiff;

Deeb, Dunn & Elferdink, Grand Rapids, Michigan, by Messrs. Joseph F. Deeb and Earl Waring Dunn, on behalf of the Defendant Merritt-Chapman & Scott Corporation.

Judge Kent: This is Civil Action No. 761, in the Northern Division, Mackinac Bridge Authority against Merritt-Chapman & Scott Corporation, and others, which is before the court an an affidavit of prejudice and certificate of counsel filed by the defendant Merritt-Chapman & Scott Corporation.

All right, Mr. Deeb. Do you want to be heard?

Mr. Deeb: Not at this time, Your Honor. The affidavit, certificate and application in connection with the matter is on file for the court's consideration.

Judge Kent: Mr. Bushnell?

Mr. Bushnell: May it please the court: I am shocked, overwhelmed, dumfounded, and amazed at the appalling lack of judgment that this petition represents.

With the court's permission, I shall not speak to this affidavit of bigotry and ignorance that has been executed by one McSlough in New York, but rather, I would address myself to the question of the certificate, which is required under Section 144 of Title 28, United States Code.

As Your Honors are well aware, this section of the act must be strictly construed; and as Your Honors are well aware, a certificate as required by Section 144 is a sine qua non without which hearing on this matter cannot proceed.

I direct the court's attention to the certificate of counsel and as signed by Joseph F. Deeb and Earl Waring Dunn, and particularly I direct your attention to the following clause:

> ". . . and the undersigned are informed as to the proceedings herein, and that the Affidavit and Application attached hereto are made in good faith and not for the purpose of hindrance or delay."

Your Honors are thoroughly familiar with the subject matter of this so-called affidavit of prepudice. As an officer of this court, I would inform the court that the substance of the matters therein set forth, specifically the chief judge's attendance at a gathering in Philadelphia, Pennsylvania, next week, was communicated by myself to Mr. Deeb at least two months ago. This communication was made as an act of courtesy to opposing counsel, and in accordance with what I understand to be the regular

rules of practice and common decency as between counsel at bar.

Further, I undestand and do believe that Earl Waring Dunn is an active member of fraternal Masonic parties in Grand Rapids; and I ask Your Honors to, in effect, take judicial notice of the fact that the chief judge's nomination for Masonic recognition was widely publicized in the public press approximately one year ago, in September of 1961. I further submit that Mr. Dunn's regular mail, I do believe, would carry notification of this fact to him; and, therefore, as a certificating attorney, he has had knowledge of this fact for the better part of a year. I further suggest that the affidavit, itself, was prepared by Dunn and submitted for execution by this man, McSlough, in New York.

I think the conclusion—

Mr. Deeb: Your Honor, please, the name is McGlough.

Mr. Bushnell: I repeat: I think the conclusion is inescapable, and I put it to Your Honors that the conclusion is inescapable, that the only purpose for filing this application, submitting an affidavit of bigotry and ignorance—and I emphasize that—and perpretrating a certificate of this sort upon this court, was for the purpose of hindrance and delay; and, therefore, this matter should be stricken from this court's records.

Judge Kent: Do you have anything to say, Mr. Deeb?

Mr. Deeb: I will not undertake to answer abuse by abuse, Your Honor.

Judge Kent: The record should show that I have with me today, because of the nature of this situation, my associate, Noel P. Fox, who was named to this court last month. Without having any direct knowledge, I understand that he has been honored by a fraternal organization.

Is that correct, Judge Fox?

Judge Fox: Several.

Judge Kent: The record may also show that Judge Starr, who is a senior judge of this court, was made a 33rd Degree Mason several years ago.

With respect to the present proceeding:

On September 6, 1960, this action was commenced by the plaintiff by the filing of a complaint with the clerk of this court at Marquette, Michigan. Since that time there have been a number of conferences in an effort to limit the issues and expedite the discovery procedures used in connection with the action. Formal hearings have been had on more than one motion and a further hearing was scheduled for Tuesday, September 18, 1962, on a motion filed by the defendant, Merritt-Chapman & Scott Corporation. At that time and at the request of counsel for the defendant the hearing was delayed to afford the defendant, Merritt-Chapman & Scott, an opportunity to file an affidavit of prejudice which was filed on September 19, 1962. The affidavit is by Myles C. McGough, Executive Vice-President of Merritt-Chapman & Scott Corporation. Attached to the affidavit is a certificate by Joseph F. Deeb and Earl Waring Dunn, counsel of record for the defendant Merritt-Chapman & Scott, in which they certify that the affidavit and application for disqualification are made in good faith and not for the purpose of hindrance or delay.

The affidavit may be summarized as follows:

It alleges that George E. Bushnell, Sr., is Sovereign Grand Commander of the Ancient Accepted Scottish Rite of Free Masonry for the Northern Masonic Jurisdiction of the United States of America.

It alleges that George E. Bushnell, Sr., is listed "Of Counsel" for the legal firm of Miller, Canfield, Paddock & Stone of Detroit, Michigan, attorneys for the plaintiff.

It alleges that George E. Bushnell, Jr., is the trial attorney for the plaintiff in this case.

It alleges that George E. Bushnell, Jr., has previously received the 33rd Degree in Scottish Rite Masonry.

It alleges that the trial judge, W. Wallace Kent, has been offered and has accepted the Honorary 33rd Degree in Scottish Rite Masonry subject to the conferring thereof during the week of September 24, 1962, in Philadelphia, Pennsylvania.

It alleges that such a degree cannot be given nor conferred except with the knowledge and consent of the Sovereign Grand Commander.

It alleges that Judge W. Wallace Kent was recently Grand Master of the Grand Lodge of Free and Accepted Masons of the State of Michigan, and that he is a member of the Scottish Rite of Free Masonry.

It alleges that these facts create prejudice and bias on the part of Judge W. Wallace Kent in favor of the Mackinac Bridge Authority, plaintiff in the above case, and requests that another judge be assigned to hear the case.

It alleges that the prejudice and bias has already been demonstrated in certain ways to the benefit of plaintiff and to the irreparable detriment of defendant Merritt-Chapman & Scott, and that the said trial judge, W. Wallace Kent, has made it impossible for defendant Merritt-Chapman & Scott to complete its present discovery proceedings as well as further discovery proceedings prior to the date again set within the past few days by the said trial judge.

Except for the allegations of bias or prejudice I have every reason to believe that the statements made are substantially true although incomplete. The truth of the affidavit cannot be adjudicated by the judge involved or by anyone else. *Berger* v. *United States*, 1921, 255 U.S. 22.

The facts should be supported to some extent. The Masonic Fraternity exists in every state of the United

States. The Grand Lodge of each state is sovereign within its state. There are many appendant organizations, including the Ancient Accepted Scottish Rite of Free Masonry, which depend upon Masonic affiliation for their members. Such appendant organizations meet and accept members only by and with the consent of the Grand Lodge of the state in which they exist. There are approximately four million Masons in these United States. Approximately 965,000 are members of the Scottish Rite. Each Grand Lodge and each appendant organization promotes and supports community and charitable activities worth many millions of dollars each year. The Scottish Rite of Free Masonry for the Northern Masonic Jurisdiction has for many years supported a program of research into the causes of mental disease. This program is supported by all the members of the organization, which operates under the direction of the Grand Commander and the Supreme Council.

Each year in September the Supreme Council meets and confers the 33rd Degree upon a class of candidates and nominates a group of distinguished Masons and citizens to receive the 33rd Degree during the following September.

The sessions of the Supreme Council, which is composed of forty-four active members, are presided over by the Sovereign Grand Commander. Presumably no person will be nominated or will receive the 33rd Degree if there is an objection from one of the active members of the Supreme Council. It is considered a distinct honor to receive the 33rd Degree and join that group of distinguished citizens which includes the Chief Justice of the United States, General Douglas MacArthur, General Mark Taylor and former President Harry S. Truman.

The defendant's affidavit is filed pursuant to the provisions of Section 144, Title 28, United States Code, which provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

It is clear that it is my duty as the district judge against whom the affidavit has been filed to determine the legal sufficiency of the affidavit. *Green* v. *Murphy*, 259 F. 2d 591, (C.A. 3, 1958). In that case the court stated at page 593:

"We are of the opinion that the case at bar is ruled by legal principles which, although they may have been cloudy in the past, are now clearly defined. It is now settled law that the judge against whom an affidavit of bias and prejudice is filed unedr Section 144, must himself pass on the legal sufficiency of the facts alleged and that in so doing he must accept the allegations of the affidavit as true. A United States District Judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit."

See also *Berger* v. *United States*, 255 U.S. 22, 1921.

The requirement contained in Section 144 of Title 28, United States Code, that the affidavit state the facts

and the reasons for the belief that bias or prejudice exists is discussed in *Hiatt v. United States*, 170 F. 2d 273, a decision of the Court of Appeals for the District of Columbia in 1948, wherein that court stated at page 278:

> "The basis for disqualification upon affidavit is that the judge has personal bias or prejudice either against the affiant or in favor of an opposite party, by reason of which the judge is unable to impartially exercise his functions in the particular case. Ex parte American Steel Barrel Co., 1913, 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379. This court said, in Hurd v. Letts, supra:" (80 U.S. App. D.C. 223, 152 F. 2d 121)
>
> "'Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice *regarding the justiciable matter pending* and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'" Citing Berger v. United States.
>
> "'Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge. * * *' (Italics supplied.)"

One of the finest discussions of the entire law which should be applied to an affidavit of prejudice is found in the decision of Judge Yankwich in *Cole v. Loew's, Inc., et al.*, (S.D. Calif. 1948), 76 F. Supp. 872. After reviewing a number of decisions Judge Yankwich sums up as follows at pages 876 and 877:

> "The rulings in these cases may be summed up in this manner:
>
> "(1) The mere filing of an affidavit does not oust the judge from the cause.

"(2) The judge has the right to determine the legal sufficiency of the affidavit.

"(3) The bias or prejudice must be personal, i.e., antagonism or opposition to the litigant, or favoritism for his opponent.

"(4) Definite views on the Law, adverse rulings in the case on trial, or adverse rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualification, *even in a criminal prosecution.*"

Judge Yankwich has also discussed the easy and the hard way in *Cole* v. *Loew's, Inc., supra*, beginning at page 878.

If I were to do as I would like to do I would withdraw from this case immediately and assign it to one of my colleagues. This I do not feel free to do. As pointed out by Judge Yankwich, in the case cited, it is my obligation as a District Judge of the United States to weigh the merits of the affidavit and disqualify myself only if the affidavit demonstrates that I as a trial judge am "of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 1921, 255 U.S. 22, 33. Attention must be called to the fact that no facts are alleged to demonstrate any lack of impartiality up to this time. Defendant states generally that I have made it impossible for defendant to complete its present discovery proceedings as well as further discovery proceedings prior to the date again set within the past few days by the said trial judge.

The record shows that a pre-trial conference was held on Jan[illegible] 27, 1961, at which time there was a discussion of discovery and counsel were advised that a further pre-trial conference would be held in April, 1961. On April 11, 1961, further pre-trial conference was held. On October 2, 1961, there was a hearing on defendant Merrit-Chapman & Scott's

motion for production of documents. In an opinion dictated from the bench the motion was granted in large part. The court advised counsel that discovery should be completed by April, 1962; that a further pre-trial conference would be held at that time; that an attempt would be made to hear further motions in January, 1962; that the case would be tried in October, 1962, with briefs to be filed by September 1, 1962.

On April 7, 1962, a further pre-trial conference was held at which time counsel were advised that their discovery should be completed by August, 1962. Certain motions have been heard in regard to discovery without complaint from the defendant that their discovery procedures were being interfered with. In the absence of any other allegations of fact there is no basis for any conclusion that defendant's conduct of the case has been interfered with by the court.

The affidavit of prejudice does not allege that there has been any improper conduct on the part of the court or Mr. Bushnell, Sr., or Mr. Bushnell, Jr. This may be in part accounted for by the fact that Mr. Bushnell, Sr., was for many years a very highly respected member of the Supreme Court of Michigan.

No allegation has been made or could be made that I have had any improper association with Mr. Bushnell, Sr., or Mr. Bushnell, Jr., or anyone connected with the plaintiff, Mackinac Bridge Authority, or any of its counsel.

I cannot accept the conclusion reached by the affiant that the acceptance of an honor conferred by a fraternity of which I have been a member for many years, and which has conferred upon me many honors in this state and in other states, necessarily warps my judgment to the extent that I should disqualify myself to hear any case in which another honored member of the fraternity is a member of the law firm which represents one of the parties.

I find nothing in this affidavit which would be sufficient to demonstrate that there is prejudice of such character as would show "a bent of mind that may prevent or impede impartiality of judgment" as to the justiciable matter which is before the court. As to this aspect of the case I must follow Judge Yankwich and reject an attempt to disqualify which has no legal foundation to support it.

It will be unpleasant to continue in this case under these circumstances. I would much prefer to gracefully bow out. In good conscience I cannot do so on the basis of this affidavit.

In addition to the insufficiency of the affidavit there is further reason why I cannot disqualify myself for the reasons stated in the affidavit. Mr. Earl Waring Dunn, one of the attorneys for the defendant, has been a Mason for many years and is a member of the Scottish Rite of Free Masonry in the Valley of Grand Rapids, as I am. Any member of that organization is aware of the fact that George E. Bushnell, Sr., is and has been for several years the Sovereign Grand Commander.

At the time that I was nominated to receive the 33rd Degree in September, 1961, (to be conferred in September, 1962), the fact of the nomination was publicized in the public press of the State of Michigan, including the Detroit Free Press, The Grand Rapids Press, The Kalamazoo Gazette, and many other newspapers. I am sure that the fact was known to Mr. Dunn because he congratulated me sometime shortly after September, 1961, upon my nomination. Thus, the facts upon which the affidavit is based have been known to defendant's counsel for almost a year.

As stated in *Refior* v. *Lansing Drop Forge Co.*, C.A. 6, 1942, 124 F. 2d 440, at page 445:

> "The statute, by its express terms, requires diligence in filing the affidavit of disqualification and does not permit a litigant, after he has knowledge of the

alleged bias or prejudice of the trial judge and without notice, to go forward in the case before filing such affidavit after the facts of disqualification are know to him."

The knowledge of Mr. Dunn, who has been in this case since the defendant first filed its appearance, is necessarily chargeable to the defendant. I must, therefore, find that the affidavit is not only insufficient but it was not timely filed.

I am privileged to state that my colleagues who are sitting en banc with me, the Honorable Noel P. Fox and the Honorable Raymond W. Starr, concur in this opinion.

An order will be entered accordingly.

The next matter before the court is the motion of the defendant Merritt-Chapman & Scott for an order finding that requests for admissions by Merritt-Chapman & Scott Corporation directed to the plaintiff are admitted by the plaintiff.

Do you want to be heard, Mr. Deeb?

Mr. Deeb: We waive oral argument, Your Honor.

Judge Kent: Beg your pardon?

Mr. Deeb: I am waiving oral argument.

Judge Kent: Mr. Bushnell, do you want to be heard?

Mr. Bushnell: Reply to Mr. Deeb's position, Your Honor, in this matter having been submitted in briefs, I shall not impose further on the court's time in argument.

Judge Kent: This matter is before the court on a motion by defendant Merritt-Chapman & Scott Corporation for an order finding that requests for admissions by Merritt-Chapman & Scott Corporation directed to the plaintiff are admitted by the plaintiff, which was filed on August 21, 1962, and was renewed on September 7, 1962, when the

defendant became impatient because the court was occupied and unable to hear the motion at an earlier time.

The requests for admissions were originally filed on July 5, 1962, having been previously served upon the plaintiff, according to the proof of service, on the 19th day of June, 1962.

Subsequently, supplemental requests for admissions were filed on August 1, 1962.

In the original group there were 327 requests for admissions. In the supplemental requests for admissions this was increased until the total included 372 requests for admissions.

By stipulation filed on June 25, 1962, counsel stipulated that the plaintiff might have forty days from the time of receiving the requests in which to file its reply to the same with the clerk of the court. An order pursuant to the stipulation was filed on June 27, 1962. Proofs of service of both sets of requests for admissions, by affidavits subscribed and sworn to on the 14th day of August, 1962, were filed on the 15th day of August, 1962.

In connection with the motion to require that the plaintiff be deemed to have admitted the 372 requests, there have been answers and replies to the motion. The answers to the requests for admissions were filed on August 22, 1962, the day after defendant's motion to require the plaintiff to admit all of the requests.

On August 10, 1962, there was a conference in the court's chambers between Mr. Deeb and Mr. Bushnell, Jr., at which time Mr. Bushnell stated that it would be impossible for him to comply with the stipulation and order previously entered; that he needed an additional ten days. Mr. Deeb stated that he was unable to agree to such an extension. The court stated that the additional ten days would not interfere with the work of the court so long as the delay

did not interfere with the schedule previously set up for the disposition of this case. Thereafter, and on August 17, 1962, Mr. Deeb refused to sign a stipulation extending the time for the filing of the answers to the requests for admissions to August 22, the date on which they were actually filed.

When the present motion was filed with the court, on August 21, 1962, it had attached to it an affidavit by Joseph F. Deeb, dated August 10, 1962, reciting that no responses had been received, at which time Mr. Deeb was well aware of the fact that the plaintiff expected to serve answers to the requests for admissions on August 22, 1962. Mr. Deeb attached a proposed order pursuant to the motion, to be signed ex parte, and called the clerk of this court at Marquette, the seat of the court in the Northern Division, to find out whether the order had been signed.

Rule 36 of the Rules of Civil Procedure provide:

> "After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or set-

ting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder."

An examination of the authorities shows that most of the cases which hold that a request for admission must be answered within ten days or else stand admitted are cases in which no answer was ever filed. *Smyth* v. *Kaufman*, 2 Cir., 114 F.2d 40; *Water Hammer Arrester Corporation* v. *Tower*, 7 Cir., 171 F.2d 877; *Chicago, Rock Island & Pacific Railroad Co.* v. *Williams*, 8 Cir., 245 F.2d 397; *O'Campo* v. *Hardisty*, 9 Cir., 262 F.2d 621; *Woods* v. *Robb*, 5 Cir., 171 F.2d 539; *Timmons* v. *United States*, 4 Cir., 194 F.2d 357, and *West Kentucky Coal Co.* v. *Walling*, 6 Cir., 153 F.2d 582.

Obviously, no extension of time beyond the forty days for answer within such "longer time as the court may allow on motion and notice" was filed by the plaintiff.

In *Countee* v. *United States*, 7 Cir., 112 F.2d 447, at page 451, the Seventh Circuit, in ruling upon a similar situation, stated:

> "Plaintiff assigns as error the overruling of his motion to strike an answer of the defendant which was filed in response to plaintiff's written request for ad-

mission of certain facts. Rule 36(a), Rules of Civil Procedure * * *. The information was being sought by plaintiff for use in a pretrial conference and plaintiff's motion to strike was based on the fact that the answer was not filed within the time allowed by the rule. There is no indication of a lack of good faith on the part of the defendant and no prejudice was caused to plaintiff. The defendant had filed one answer within the time fixed by the rule and upon plaintiff's objection at a subsequent pretrial conference the court had granted an extension of time to the defendant to file another answer. The procedure was not strictly in accord with the rules but in view of the good faith of the defendant and the lack of any prejudice to the plaintiff the trial court did not err in overruling plaintiff's motion to strike the answer."

We feel that the District Court in Pennsylvania, in *Frankel* v. *International Scrap Iron and Metal Co.*, D.C. Pa., 157 F. Supp. 709, properly covered the situation when it said, at pages 713 and 714:

"It is a fact that International failed to answer or object to the requests for admission, and plaintiff points out that under Rule 36, Federal Rules of Civil Procedure, 28 U.S.C., same are deemed to be admitted.

"The admissions cannot be taken as controlling. Decision should not be based on mere matters of pleadings or technical admission. As the United States Supreme Court has pointed out at the current term, 'the purpose of pleading is to facilitate a proper decision on the merits,' Conley v. Gibson, 78 S.Ct. 99, 103 (Nov. 18, 1957). The opinion of Mr. Justice Black adds:

" ' * * * The Federal Rules reject the approach that pleading is a game of skill in which one misstep by

counsel may be decisive as to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf Maty v. Grasselli Chemical Co., 1937, 303 U.S. 197 * * * ."

In reaching a proper conclusion in this case, the court feels that it should consider the entire file and not only the present situation.

The record shows that the complaint was filed on September 6, 1960. Service was obtained upon the defendant Merrit-Chapman & Scott Corporation on October 6, 1960, as demonstrated by a proof of service filed with the clerk of the court on October 11, 1960. Pursuant to stipulation extending the time, the answer of the defendant, Merritt-Chapman & Scott was filed on November 14, 1960.

After some original difficulties resulting from a clash of personalities, it appeared to the court that discovery procedure was being pursued and that counsel were making every effort to obtain all of the information which could be obtained through the cooperation of counsel.

On April 12, 1962, an amended complaint was filed. On June 19, 1962, a stipulation was filed extending the time for the defendant Merritt-Chapman & Scott to file its answer to the amended complaint, extending the time until fifteen days after the plaintiff had served its answers to the requests for admissions upon the said defendant.

At all times until the 10th day of August, 1962, it appeared that counsel for all parties were attempting to cooperate in an effort to provide all of the information available so that the case, when heard, could be heard on the merits of the controversy. Even on that day, no indication was given by counsel for the defendant of any intention to exact the procedural penalty of a default. The motion filed on August 21, 1962, came as a complete surprise to the court, and we assume it was an equal surprise to counsel for the plaintiff.

As has been frequently stated, the Rules of Civil Procedure were devised to prevent default by technciality and trial for ambush. The only purpose of the rules was to eliminate the technical requirements of pleading which might cause a default on the part of a party because of failure to plead in such fashion that there was an adequate answer to, or failure to deny, a previous pleading. It was the intent of the drafters of the rules and of the Supreme Court of the United States in adopting the rules that pleadings should be simplified, that discovery should be resorted to, that technicalities should be abandoned, and that trial should be had upon the merits of the controversies.

No complaint was made by the plaintiff because of the failure on the part of the defendant Merritt-Chapman & Scott, in its requests for admission, to exhibit the documents described with the requests for admissions.

Under all the circumstances, and in view of the history of this case, this court is of the opinion that the imposition of the drastic remedy of default is not justified and should not be imposed upon the plaintiff. The serious mechanical problem of answering 372 requests for admissions in itself would require consideration for the counsel expected to answer such requests.

For the reasons stated, an order may be entered denying the motion filed by the defendant Merritt-Chapman & Scott Corporation to require that the plaintiff may be deemed to have admitted the 372 requests for admissions.

I am privileged to state that Judge Fox and Judge Starr, the other judges in this district, coneur in this opinion.

You may enter an order accordinly, Mr. Ziel.

All right, we will recess.

APPENDIX E

UNITED STATES OF AMERICA
THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 761

MACKINAC BRIDGE AUTHORITY,
a Michigan statutory body
corporate,
Plaintiff,

- vs -

MERRITT-CHAPMAN & SCOTT CORPORATION,
a Delaware corporation,

and

PREPAKT CONCRETE COMPANY,
an Ohio corporation,
Defendants.

Motion For Continuance From October 1, 1962

NOW COMES Joseph F. Deeb, Attorney for Defendant Merritt-Chapman & Scott Corporation, associated with Earl Waring Dunn, and respectfully requests this Court to order a continuance of the trial upon the merits in the above captioned cause, from [illegible] dated September 11, 1962, received September 13, 1962 at 9:30 A.M., again setting this matter for trial, which is the third notification to the parties by letter order regarding the same trial date.

Our reasons, briefly detailed and most respectfully stated, are as follows:

1. That by reason of the disallowance, on the forenoon of the 21st day of September, 1962, of the Affidavit of Prejudice filed by Defendant Merritt-Chapman & Scott Corporation, and upon the denial on this same date of this.

Defendant's Motion dated August 20, 1962, and renewed by a separate motion filed September 7, 1962, to order all 372 Requests for Admission as admitted, and because the business of this Court, as repeatedly stated by this Court, will not allow any hearings on discovery procedures, even those pending, including Motion for Summary Judgment, this Defendant is now certainly placed in a position which obviously denies it the benefit of even the most ordinary use of the Federal Rules of Civil Procedure, and prevents it from presenting to this Court, before the trial date set, many valid objections to the Plaintiff's responses herein, which it refers to as follows:

a. The response filed in behalf of the Plaintiff is not a proper response because it is not sworn to by the Plaintiff.

b. The response is improper because it attempts to avoid an answer to many of this Defendant's Requests for Admission by substituting a statement of the admission of genuineness of documents in the place and stead of answering directly the requests made, even to the extent of admitting the genuineness of a document where no document is referred to in the request by reason of which this Defendant is prevented from having a sworn statement of the party on the matter requested.

c. That the Plaintiff has improperly sought to evade many of the Requests of this Defendant by a denial of the same supported by reasons which are, in fact, objections to the request, which objections should have been stated as objections, considered by this Court as such, and noticed by the Plaintiff pursuant to Rule 36.

d. That the Plaintiff has improperly answered some of said Requests by adopting as its answer, answers made to one or more previous requests, so that the answer made is indefinite, ambiguous, evasive and uncertain.

e. That if the trial of the within cause is held on October 1, 1962, there is no means open to this Defendant by which it can present the foregoing objections to the trial court,

2. Because, depending upon the Court's order after consideration of this Defendant's future petition with respect to the petition now in preparation will, in turn, depend this Defendant's future course of action again with respect to further discovery proceedings, and that in this connection the Court has been advised that the taking of a large numbers of depositions by this Defendant is dependent upon the outcome of Defendant's Requests for Admissions upon Plaintiff in the within cause.

3. The Motion for Summary Judgment filed in this cause and filed as of August 1, 1962, only because this Defendant desired to comply with the restrictive order requiring that all motions be filed by the latest, August 1, 1962, contained a reservation that the said Motion would have to be amended depending entirely upon Plaintiff's response to 372 Requests for Admissions under Rule 36 filed to date (with more Requests for Admissions under consideration) and dependent upon Plaintiff's compliance with the prior general order of this court re discovery, which included compliance with this Defendant's request for the photographs in connection with the Engineering Research Institute of the University of Michigan.

4. That further, and in conection with the Requests of this Defendant for Admissions from the Plaintiff, such determination as the Court may make as to the effect of the admissions directly affect the character and extent of the expert testimony which this Defendant will have to produce, and that it is impossible for this Defendant to confer with experts with reference to their serving as witnesses in this case until after this Defendant shall know what the Plaintiff has admitted in connection with this Defendant's Requests for Admissions.

5. That the foregoing reasons for this Motion for a substantial continuance of trial date beyond October 1st, 1962 are apparent upon the facts related herein, and this Court is respectfully requested to give this Defendant

notice, forthwith, if it is going to disallow this Motion for the reason that time is a material factor, and that otherwise, this Defendant cannot have a ruling on this Motion, since this Court is going to be absent from the jurisdiction commencing on Monday, September 24, 1962, and for an undetermined length of time after next Monday, and further because Appellate Procedure should not be taken by this Defendant until a final effort by this Defendant for a continuance, in spite of the fact that this Court has already indicated more than once, that it is adamant in the trial date it has set, namely, October 1, 1962

DATED: September 21, 1962

.....

Joseph F. Deeb, Attorney for
Defendant Merritt Chapman &
Scott Corporation
Business Address:
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Grand Rapids 2, Michigan

OF COUNSEL:

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APPENDIX F

Opinion of the Court of Appeals

No. 14308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL G. ALBERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, and HON. W. WALLACE KENT, Judge of said court,
Respondents.

Petition For a Writ of Mandamus and Prohibition

(Filed October 19, 1960)

Before: MILLER, CECIL and WEICK, Circuit Judges.

WEICK, Circuit Judge. This is an original action in mandamus and prohibition to compel the District Judge to certify his disqualification to hear a certain pending action and to prohibit him from conducting further proceedings therein because of his alleged personal bias and prejudice.

An affidavit alleging personal bias and prejudice on the part of the Judge in favor of and against certain parties and attorneys in said pending action in the District Court was filed by petitioner under the provisions of Title 28 U.S.C. paragraph 144.

The District Judge, upon consideration of the affidavit of personal bias and prejudice, held that it was insufficient to require him to disqualify himself and refused to do so. The present proceeding followed in an attempt to obtain a review of the order entered by him.

The mere filing of an affidavit of personal bias and prejudice against the District Judge did not result in his automatic disqualification.[1] The statute requires the affidavit to state something more than that the judge has a personal bias of prejudice. It provides that "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . ." Title 28 U.S.C. paragraph 144.

The District Judge had a duty to determine whether the statutory requirement has been met. To do so he was required to pass upon the legal sufficiency of the affidavit. In the consideration of the matter, he must accept the fact alleged in the affidavit as true, as they may not be controverted. *Green* v. *Murphy*, 259 F. 2d 591 (CA 3, 1958); *Eisler* v. *United States*, 170 F. 2d 273 (CA DC, 1948).

The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. *Collier* v. *Picard*, 237 F. 2d 234 (CA 6, 1956).

Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. *United States* v. *Wilbur*, 283 U.S. 414; *Girard Trust Co.* v. *Helvering*, 301 U.S. 540; *Rayborn* v. *Thomas, Warden*, ___ F. 2d ___ (CA 6, 1960).

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[1] The decision in this case was criticized in an article entitled "Psychiatric Evidence In the Recusation of Judges" because of the claim that the court did not give proper effect to psychiatric evidence which had been offered. 73 Harvard Law Review 1325.

The opinion of the District Court is reported under the title of *United States* v. *Gilboy*, 162 F. Supp. 384 (DC MD, Pa., 1958). The District Judge finally did withdraw from the case in order that it could be expeditiously tried. *United States* v. *Gilboy*, 166 F. Supp. 220.

In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a ministerial, but a judicial act.

Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. *Ex parte Flippin*, 94 U.S. 348 (1876), or to compel him to decide according to the dictates of any judgment but his own, *United States* v. *Lawrence*, 3 Dallas 42 (1795), or to control the exercise of his discretion. *Gottlieb* v. *Rubenstein*, 252 F. 2d 779 (CA 6, 1958). This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943); *Beneke* v. *Weick*, 275 F. 2d 38 (CA 6, 1960).

The writ may be granted only where it is clear and undisputable that there is no other legal remedy. *Ex parte American Steel Barrel Co. and Seaman*, 230 U.S. 35 (1913).

Mandamus has been held not to be the proper remedy to compel a judge to recuse himself. *Green* v. *Murphy*, 259 F. 2d 591 (CA 3, 1958); *Korer* v. *Hoffman*, 213 F. 2d 211 (CA 7, 1954); *Hurd* v. *Letts*, 152 F. 2d 121 (CA DC, 1954).

In *Connolley* v. *United States District Court*, 191 F. 2d 692 (CA 9, 1951) the Court issued a writ of prohibition, but the footnote on page 693 of the opinion indicates that no question was raised over its power to do so. This decision was followed in *Gladstein* v. *McLaughlin*, 230 F. 2d 762 (CA 9, 1955) wherein the Court of Appeals felt it was unnecessary to issue the writ as the District Judge upon consideration of its opinion would refrain from proceeding further. In concurring, Circuit Judge Pope was of the view that the Court, in the same footnote in *Connelly*, had misconstrued the language of *Berger* v. *United States*, 255 U. S. 22, which was that "remedy by appeal was inadequate." id. 36. In *Korer* v. *Hoffman*, *supra* it was pointed out that what the Supreme Court in *Berger* was referring to was the efficacy of an appeal

if the District Judge had been authorized to decide upon the truth of the facts set forth in the affidavit of bias and prejudice. In any event, *Berger* was not a mandamus case, but was an appeal from a judgment of conviction in a criminal case.

In *Williams* v. *Kent*, 216 F. 2d 342 (CA 6, 1954) we passed upon the sufficiency of an affidavit of prejudice in a mandamus proceeding "assuming that a writ might appropriately issue in such a case" and held that it failed to show bias or prejudice personal to the District Judge.

In the present case, the District Judge, in an oral opinion, analyzed each of the claims of petitioner and the facts alleged in the affidavit in support of them and pointed out the reasons why the facts did not support the charge of bias and prejudice. In our judgment, he had jurisdiction to do so.

We have carefully examined the affidavit of personal bias and prejudice and are of the opinion that we would not be justified in issuing a writ of mandamus or prohibition. We do not believe that the facts alleged in the petition are sufficient to establish any bias or prejudice personal to the District Judge.

The Petition for a Writ of Mandamus and Prohibition is dismissed.

APPENDIX G

(Filed Dec 1962)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN THE MATTER OF MERRITT-
CHAPMAN & SCOTT CORPORATION,
Petitioner,

vs

HONORABLE W. WALLACE KENT,
United States District Judge
for the Western District of
Michigan,
Respondent.

Order

Before: CECIL, Chief Judge, MILLER and WEICK, Circuit Judges.

In view of the length of time this case has been pending in the District Court, we see no reason why proceedings, other than the trial of the case, should be stayed pending review by the Supreme Court. This will enable the parties to get the case ready for trial so that it may be tried when the Supreme Court has acted.

The petitioner's motion for a stay is, therefore, denied, without prejudice to renewal of the motion, in the event that the District Court assigns the case for trial before the Supreme Court has acted.

/s/ Paul C. Weick
United States Circuit Judge

APPENDIX H

Ford to Get High Degree

SLATED FOR HONOR AT MASONIC MEET

Rep. Gerald R. Ford of Grand Rapids will be among 14 Michigan Freemasons to receive the 33rd Degree—the highest degree of Scottish Rite Masonry—at the annual session of the fraternity in Philadelphia Sept. 20-27 at which 158 will receive the degree.

Percival F. Edwards, also of Grand Rapids, a retired Michigan Bell Telephone Co. official, also will receive the honor.

Others to Be Honored

The 33rd Degree also will be conferred on U.S. District Judge W. Wallace Kent of Kalamazoo, a past Grand Master of the Michigan Masons; Circuit Judge Donald E. Holbrook of Clare, Charles J. Strosacker of Midland, a Dow Chemical Co. executive; Ralph W. Moore of Birmingham, retired General Motors Corp. executive; Harold P. Mills of Farmington, a telephone company executive; William W. Merrill of Bloomfield Hills; Charles Fey of Lathrup Village; Earle W. Mott, a Detroit undertaker; Carl P. Stoliker of Port Huron, transportation executive; August B. Johnson of Mount Morris, retired building contractor; Fred B. Crego of Benton Harbor, packing firm executive, and Selmer E. Strand of Muskegon Heights, packaging engineer.

Michigan Masons will hold high positions at this 150th annual meeting of the Supreme Council, 33rd Degree for the Northern Masonic Jurisdiction of the United States.

George E. Bushnell, retired state Supreme Court justice, is Sovereign Grand Commander of Scottish Rite Freemasonry, and will preside over all sessions. Others include Clyde A. Fulton of Charlotte, Grand Master General of Ceremonies; Ernest L. Pearce of Marquette and Orville H. Foster Jr., Supreme Council members, and Dr. Malcolm D. MacQueen of Detroit, Grand Sword Bearer.